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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

12 NETWORK PROTECTION SCIENCES,
13 LLC

14 Plaintiff,
15 v.
16 FORTINET, INC.
17 Defendant.

No. 3:12-CV-01106-WHA

**FORTINET, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
FOR (i) LACK OF STANDING AND
(ii) LITIGATION MISCONDUCT**

Hearing Date: July 18, 2013
Time: 8:00 a.m.
Judge: William H. Alsup

NOTICE OF MOTION

2 PLEASE TAKE NOTICE THAT Defendant Fortinet, Inc. (“Fortinet”) hereby moves to
3 dismiss this case with prejudice for lack of standing and for litigation misconduct by Plaintiff
4 Network Protection Sciences, LLC (“NPS”). NPS lacks standing to assert the patent-in-suit (“the
5 ‘601 patent”) against Fortinet because NPS did not own the ‘601 patent when it filed this lawsuit
6 on July 6, 2010, nor does NPS own the ‘601 patent even today. Furthermore, NPS has engaged in
7 misconduct in this case for almost three years, including (i) presenting an untrue “Texas story” by
8 alleging, arguing and swearing that it has headquarters and an employee in Texas, which fake
9 employee supposedly executed the document transferring the ‘601 patent to NPS (“Alleged
10 Assignment”); (ii) serving incomplete interrogatory answers on the issue of standing; (iii) failing
11 to produce the Alleged Assignment until over two years after filing suit; and (iv) imposing a
12 “bone-crushing” burden on Fortinet with impermissibly broad infringement contentions for a
13 patent that NPS does not own. NPS’s lack of standing and litigation misconduct each, separately,
14 provides sufficient basis for dismissing this case.

15 This motion is set for hearing on July 18, 2013, at 8:00 a.m. It is based upon the following
16 Memorandum of Points and Authorities, the supporting Declaration of John M. Neukom, exhibits
17 to that declaration, and such other matters as may be presented at the time of the hearing and
18 allowed by the Court.

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1 **I. INTRODUCTION**

2 Defendant Fortinet, Inc.’s motion to dismiss has a short explanation and a long
 3 explanation. The short explanation is that Plaintiff (“NPS”) filed this lawsuit asserting just one
 4 patent (“the ‘601 patent”) on July 6, 2010, and yet did not become the owner of the ‘601 patent—
 5 if ever—until 22 days later, on July 28, 2010. NPS therefore lacked standing to assert the ‘601
 6 patent when it filed this suit. Under Federal Circuit precedent, that lack of standing cannot be
 7 remedied after-the-fact, and requires dismissal.

8 The long explanation is more colorful and entails almost three years of litigation
 9 misconduct by NPS. The long explanation also shows why this case should be dismissed with
 10 prejudice, and forms the basis for Fortinet’s request for attorneys’ fees.

11 NPS is owned by two Californians named Rakesh Ramde and Wilfred Lam. Ramde and
 12 Lam used to practice the law, although in recent years they have dedicated themselves to buying
 13 and then asserting patents against operating companies like Fortinet. As far as Fortinet can tell,
 14 since 2010 Ramde and Lam have used 17 law firms to assert patents in a dozen or more lawsuits
 15 against 40 or more operating companies.

16 While Fortinet cannot speak to Ramde and Lam’s litigation conduct in all of those other
 17 proceedings, in this case they have filed false statements in motion papers, filed a false
 18 declaration, and withheld production of a crucial document for over two years. As to the crucial
 19 document: Although Ramde and Lam filed this case on July 6, 2010, they failed to produce the
 20 document that supposedly shows their ownership of the ‘601 patent (“Alleged Assignment”) until
 21 August 31, 2012. Even then, Ramde and Lam twice provided evasive interrogatory answers on
 22 the standing issue that forms the basis of this motion, and then tried to delay and then cancel the
 23 deposition of Gregory Cuke. Cuke is the individual NPS previously identified as (i) a Texas
 24 “employee,” (ii) NPS’s “Director of Business Development,” and (iii) the signatory on the Alleged
 25 Assignment. But Cuke testified six days ago that he is not an employee; the “Director” title is a
 26 litigation sham; and he did not sign the Alleged Assignment until 22 days after suit was filed.

27

28

1 **II. BACKGROUND**2 **A. Procedural Summary of This Case**

3 NPS filed this case on July 6, 2010, in the Eastern District of Texas. Docket No. 1. NPS
 4 asserted a single patent, the '601 patent, against Fortinet and five other defendants. *Id.* The
 5 defendants moved to transfer the case to this District in January 2011, Docket No. 54, and the
 6 Honorable Rodney Gilstrap granted that motion in January 2012, Docket No. 121.

7 Shortly after the case was transferred to this District, this Court cited the misjoinder
 8 provisions of Fed. R. Civ. P. 21 and dismissed all defendants from the case, without prejudice,
 9 except for Fortinet. Docket No. 150.

10 The Court heard arguments on claim construction in December 2012, and entered a final
 11 claim construction ruling on January 14, 2013. Docket No. 189. Fortinet filed an opposed motion
 12 for leave to amend invalidity contentions on April 4, 2013, which the Court granted in an order
 13 dated May 9, 2013. Docket No. 197.

14 In the Court's order granting Fortinet leave to amend invalidity contentions, it cited
 15 litigation misconduct by NPS, finding that NPS had put a "bone-crushing burden" on Fortinet by
 16 asserting too many patent claims and that "NPS has behaved unreasonably in imposing
 17 unnecessary cost on its opponent." *Id.* at 3.

18 **B. The Plaintiff: NPS, Rakesh Ramde and Wilfred Lam**

19 NPS is owned and controlled by two individuals, Rakesh Ramde and Wilfred Lam. Exh. 1
 20 (NPS's initial disclosures, identifying Ramde as the "President and principal shareholder" of
 21 NPS's parent corporation; identifying Lam as a "shareholder" of the same).¹

22 Ramde was admitted to the California Bar in 1998 and remains admitted today (SBN
 23 196390). Lam was admitted to the California Bar in 1996 and also remains admitted (SBN
 24 184388). It appears that Ramde and Lam met while practicing law at the firm Pennie & Edmonds
 25 in 2001-02. Exh. 2 at ¶ 2 (Ramde's sworn declaration). Shortly thereafter, in 2002, they both

26
 27 ¹ All citations to "Exh." refer to exhibits to the Declaration of John M. Neukom, filed
 28 herewith.

1 stopped practicing law and formed a patent business together called “IMSciences.” *Id.* Ramde
 2 and Lam maintain their office in Mountain View, California. Exh. 3.

3 The business of IMSciences is not patent ownership but rather patent brokering; it is an
 4 “advisory firm that helps . . . companies leverage and monetize . . . patented technologies.” Exh.
 5 3. Ramde and Lam do not just advise third parties who own patents, however. They also buy and
 6 attempt to “monetize” patents for their own benefit. Ramde and Lam do this through a dizzying
 7 array of legal entities. The extent of Ramde and Lam’s ownership of legal entities and patents is
 8 not fully known to Fortinet, but it appears to include at least ten different LLCs, one of which is
 9 Mount Hamilton Partners LLC (“Mount Hamilton”) and another of which is the plaintiff in this
 10 case, NPS.²

11 Likewise, the extent of Ramde and Lam’s litigation conduct is not known to Fortinet, but it
 12 appears they are binging on patent litigation. “Courtlink” and public court records indicate that,
 13 through a handful of their legal entities, just since 2010 Ramde and Lam have asserted patent
 14 claims in a dozen or more different lawsuits against 40 or more different defendants in six
 15 different federal courts, using 17 different law firms.³

16 **C. The Defendant: Fortinet**

17 Fortinet was founded in 2000, and manufacturers and sells network security products.
 18 Fortinet is a publicly-traded company based in Sunnyvale, California that employs over 2,000
 19 people. Exh. 5.

20
 21
 22
 23
 24 ² Other patent-holding companies owned and controlled by Ramde and Lam appear to
 25 include Unifi Scientific Advances, Unifi Scientific Batteries, UniStar Technologies, i2Z
 26 Technology, Network Directory Sciences, Divan Industries, Search Light Advances, and
 27 Mainstream Scientific. Neukom Decl. at ¶ 5.

28 ³ Fortinet has pulled “Courtlink” profiles for various legal entities owned by Ramde and Lam,
 29 including i2Z Technology, Mount Hamilton, NPS and Unifi Scientific Batteries. Exh. 4; *see also*
 30 Neukom Decl. at ¶ 6.

1 **D. Pre-Litigation History of the ‘601 Patent: From Commercial Failure... to**
 2 **Bankruptcy... to Lapsed PTO Fees... to Ramde and Lam**

3 A Canadian individual named Hung Vu is listed as the sole inventor of the ‘601 patent.
 4 Exh. 6. When the ‘601 patent’s application was pending, in 1994, Vu assigned his ownership of
 5 the application to an upstart Canadian company he had recently founded called Milkyway
 6 Networks. Exh. 7. Milkyway Networks apparently became the assignee of the ‘601 patent
 7 application in exchange for paying Vu one dollar. *Id.*

8 About three years later, in 1997, the U.S. Patent & Trademark Office (“PTO”) issued the
 9 ‘601 patent to Milkyway Networks. Exh. 6. Although Milkyway Networks grew rapidly from
 10 1994 to 1997, within a year of the ‘601 patent’s issuance, the company had become a commercial
 11 failure. It is clear that Milkyway Networks and its efforts to practice the ‘601 patent resulted in
 12 commercial failure because, in 1998, Milkyway Networks was sold to another Canadian company
 13 called SLM Networks. At that time, the trading price of Milkyway Networks on the Toronto
 14 Stock Exchange was less than the value of cash available to shareholders. *Viz.*, Milkyway
 15 Networks was valued by the public trading market to be worth less than the amount of money in
 16 its bank account. Exh. 8 at FORT-NPS 147015 (disclosing net “Cash available to shareholders” of
 17 \$1.25 per share, and an average closing price for the 20 preceding days of \$1.22 per share). SLM
 18 Networks apparently became the assignee of the ‘601 patent pursuant to its 1998 acquisition of
 19 Milkyway Networks. Exh. 9.

20 SLM Networks fared even worse than Milkyway Networks, and declared bankruptcy. As
 21 an asset of a bankrupt Canadian company, the ‘601 patent was handled by a receiver, and with
 22 Canadian judicial approval was sold out of bankruptcy in 2004 for the modest sum of two dollars.
 23 According to the assignment documents, the company that chose to pay two dollars to acquire the
 24 ‘601 patent out of bankruptcy was another Canadian company, Bevertec CST Inc. Exh. 10.

25 Once Bevertec became the owner of the ‘601 patent, it promptly failed to pay maintenance
 26 fees with the PTO. Exh. 11. The ‘601 patent therefore lapsed, and remained lapsed for over a
 27 year. During that year, however, the two individuals behind this lawsuit—Ramde and Lam—

1 bought the lapsed ‘601 patent from Bevertec. To purchase the ‘601 patent, Ramde and Lam chose
 2 to use one of their patent-holding entities, Mount Hamilton Partners, LLC. Exh. 12.

3 **E. Ramde and Lam Filed Suit in East Texas Using a Longview, Texas Address
 and Under the Name “Network Protection Sciences, LLC”**

4 Ramde and Lam filed this lawsuit against Fortinet and others on July 6, 2010, under the
 5 name “Network Protection Sciences, LLC” in the U.S. District Court for the Eastern District of
 6 Texas. Docket No. 1. In filing suit—and many times since—Ramde, Lam, NPS and NPS’s
 7 counsel have told a “Texas story.” They have represented that NPS has “headquarters” in
 8 Longview, Texas. *See, e.g.*, Docket No. 65 at p. 8. They have represented that NPS has a
 9 “Director of Business Development” who is an “employee” in Longview, Texas. *See, e.g.*, Exh. 1
 10 (“Director of Business Development”); Docket No. 65 at p. 1 (“Texas employee”). And NPS has
 11 more recently attempted to support its claim to be the owner of the ‘601 patent by producing a
 12 document bearing the signature of NPS’s supposed “Director of Business Development” in Texas.
 13 Exh. 13.

14 As shown below, this “Texas story” is a fraud. NPS has no headquarters in Texas. NPS
 15 has no employee in Texas. And the document that NPS has produced to show ownership of the
 16 ‘601 patent—signed by the fake employee in Texas—is deficient to show standing on July 6,
 17 2010, or ever.

18 **F. In April 2011, NPS Explained How It Became the Assignee of the ‘601 Patent
 With a Single, Misleading Sentence**

19 In 2011—when this case was still pending in Texas and contained multiple defendants—
 20 NPS answered an interrogatory that asked for the “history of ownership” of the ‘601 patent, as
 21 well as “the circumstances . . . surrounding the negotiation and execution of any transfer of
 22 ownership.” Exh. 14 at p. 4. NPS provided a two-paragraph response. But on the issue that is
 23 crucial to this motion—how, if at all, the ‘601 patent was transferred from Mount Hamilton to
 24 NPS—NPS provided only a single sentence:

25 Mount Hamilton Partners, LLC signed an Assignment of Patent
 26 Rights on April 30, 2010 transferring the patent rights to Network
 27 Protection Sciences, LLC which owns all right title and interest in
 28 the patent-in-suit including the right to sue for past damages.

1 Exh. 14 at p. 5. Ramde “verified” that answer on April 8, 2011. *Id.* at p. 11.

2 **G. In August 2012—Over Two Years After Filing Suit—NPS Finally Produced
3 the Alleged Assignment**

4 Although NPS filed this case on July 6, 2010, Ramde and Lam filed no paperwork with the
5 PTO asserting ownership of the patent by NPS until over a year later. And NPS waited to produce
6 any documentation in this litigation showing that it was—supposedly—the owner of the ‘601
7 patent until August 31, 2012. Exh. 30 at p. 8 (indicating the Bates range including the Alleged
8 Assignment); *id.* at p. 9 (indicating that the document was being produced that evening, August
9 31, 2012). On that date, NPS produced the Alleged Assignment that purports to “sell” and
10 “assign” the ‘601 patent from Mount Hamilton to NPS. Exh. 13. That document purports to have
11 been signed by a Mount Hamilton representative on April 30, 2010. *Id.* But it was not signed by a
12 purported NPS representative until July 28, 2010—22 days after this suit was filed by NPS. *Id.*

13 **H. In January 2013, Fortinet Requested the Deposition of Gregory Cuke, the
14 Suspected NPS Signatory on the Alleged Assignment**

15 Fortinet’s first batch of deposition requests in this case included a subpoena for the
16 testimony of Gregory Cuke. Fortinet served the Cuke subpoena on January 24, 2013. Exh. 15.
17 Fortinet asked for Cuke’s deposition in part because Fortinet suspected that he was the NPS
18 signatory on the Alleged Assignment. The NPS signature on that document is illegible, and there
19 is no individual’s name typed or written on the NPS signature block. However, the NPS signatory
20 wrote his title as “Director of Business Development,” which matches NPS’s description of Cuke.
21 *Compare* Exh. 13, *with* Exh. 1 at p. 2.

22 In response to Fortinet’s January 24, 2013, subpoena for Cuke’s testimony, NPS began a
23 multi-month game of delay. For about ten days, NPS would not confirm that it would even accept
24 service of a subpoena for Cuke. Exh. 16 (email from NPS’s counsel on January 29, 2013, stating
25 that NPS would “respond to the request to accept service in the next few days”). NPS counsel
26 would not initially accept service of the Cuke subpoena even though Cuke was listed in NPS’s
27 own initial disclosures as a relevant witness who “can be reached through counsel for NPS.” Exh.
28 1 at p. 2.

1 On February 5, 2013, NPS counsel confirmed they would accept service of the Cuke
 2 subpoena, although at that point failed to offer a deposition date: “[W]e are in the process of
 3 clarifying schedules on our end and hope to have reasonable timeframes to propose in the next day
 4 or so.” Exh. 17. But NPS did not propose any deposition date for Cuke “in the next day or so.”
 5 Neukom Decl. at ¶ 21.

6 Instead, on February 19, 2013, NPS counsel served objections to the Cuke subpoena. NPS
 7 “object[ed] to the noticed date and location to testify as unduly burdensome,” and proposed no
 8 alternative dates. Exh. 18.

9 Over a month passed, and NPS still failed even to propose a date for the Cuke deposition.
 10 So Fortinet wrote to NPS on March 26, 2013, and asked for dates for a Cuke deposition. Exh. 19.
 11 Fortinet wrote to NPS again on March 28, 2013, and asked for dates for a Cuke deposition. Exh.
 12 20. Counsel for the parties conducted a meet-and-confer on March 29, 2013, to discuss—*inter*
 13 *alia*—Fortinet’s request for a Cuke deposition. NPS counsel still provided no date for the Cuke
 14 deposition. Neukom Decl. at ¶ 25.

15 In early May 2013—over three months after Fortinet served a subpoena—NPS finally
 16 offered dates for a Cuke deposition. Thereafter, counsel agreed to June 7, 2013.

17 **I. In March 2013, NPS Explained How It Became the Assignee of the ‘601 Patent
 18 (Again) With a Single, Misleading Sentence**

19 In 2013, Fortinet served a more detailed interrogatory on NPS, asking NPS to provide “the
 20 history of ownership” of the patent; the “terms” of any ownership transfers, including dollar
 21 amounts; and “the circumstances (including dates) surrounding the negotiation and execution of
 22 any transfer of ownership.” Exh. 21 at p. 5. In response to that more detailed interrogatory, NPS
 23 provided no additional information. Instead, NPS repeated verbatim its 2011 interrogatory
 24 answer: “Mount Hamilton Partners, LLC signed an Assignment of Patent Rights on April 30, 2010
 25 . . .” *Id.* at p. 7. Ramde “verified” that interrogatory answer as well. Exh. 22.

26 On May 14, 2013, in writing, Fortinet explained to NPS that its interrogatory answer
 27 regarding how it supposedly became the assignee of the ‘601 patent was incomplete. Exh. 23 at p.
 28 4 (regarding “Interrogatory No. 2”). In an email dated May 28, 2013, NPS stated it “would

1 investigate and provide a [supplemented] response [to Interrogatory No. 2] from Wednesday, May
 2 29th to Friday, May 31st.” Exh. 24. But May 31, 2013, has come and gone, and NPS has still
 3 failed to provide any additional information about how it became the owner of the ‘601 patent.
 4 Neukom Decl. ¶ 30.

5 **J. June 7, 2013: Fortinet Took Cuke’s Deposition**

6 Eight days before the scheduled Cuke deposition on June 7, 2013, NPS tried to remove
 7 him from the case altogether. On May 30, 2013, NPS counsel wrote:

8 I write to inform you that **NPS is removing Gregory Cuke as an individual that**
 9 **may have information that NPS may use to support its claims** or defenses as
 identified in NPS’ initial disclosures. Please let us know if Fortinet still plans on
 going forward with Mr. Cuke’s deposition.

10
 11 Exh. 25 (emphasis added). Fortinet declined NPS’s invitation to drop the Cuke deposition.

12 Cuke appeared for his deposition at a hotel in Shreveport, Louisiana. Fortinet’s lead
 13 counsel made the trip from San Francisco and questioned the witness. The attorney that NPS
 14 chose to send to defend Cuke’s testimony has not filed an appearance in this case, is not admitted
 15 in California, and is not admitted (*pro hac vice* or otherwise) in this District. Neukom Decl. at ¶¶
 16 32-34. Fortinet’s examination of Cuke lasted only 133 minutes on the record.

17 **1. Cuke is not an NPS employee**

18 NPS has stated that Cuke is a “Texas employee” of the company. Docket No. 65 at 1. But
 19 Cuke testified that is not true. Exh. 26 at 9:15-17 (“**Q.** Do you consider yourself an employee of
 20 Network Protection Sciences? **A.** No, sir.”); 11:3-5 (“**Q.** And from sometime in 2010 until today,
 21 have you been an employee of NPS? **A.** No, sir, I’ve never been an employee of NPS.”); 34:4-6
 22 (“**Q.** [Y]ou don’t consider yourself even an employee of NPS. Is that correct? **A.** No, I’m not an
 23 employee.”); 37:25-38:2 (“**Q.** So far as you know, NPS has not a single employee in the state of
 24 Texas. Is that correct? **A.** I don’t know of any.”).

25 In addition to contradicting NPS’s repeated claims in this litigation, that he is an
 26 “employee,” Cuke also testified that he has spent only “four or five hours” providing litigation
 27 support for NPS in 2013. *Id.* at 20:23-21:4. Asked how many hours he performed services for
 28 NPS in all of 2012, Cuke testified: “I have no earthly idea. Not too many.” *Id.* at 21:11-13. Cuke

1 even testified that he cannot remember the last time he asked NPS for payment for **any** hourly
 2 services he performed for them: “I can’t remember the last time I submitted an invoice.” *Id.* at
 3 23:1-6.

4 Finally, while NPS has filed numerous papers in this litigation that identified Cuke as the
 5 “Director of Business Development,” Cuke admitted that title is a litigation sham:

6 **Q.** As you sit here today, you acknowledge that there are numerous documents
 7 identifying you as the director of business development for NPS, which
 documents were created for and filed in this litigation. Correct?

8 **A.** Yes.

9 **Q.** And you can’t think of a single other document identifying you as the director
 10 of business development for NPS that was created for any other purpose other
 than this litigation?

11 **A.** No, not specifically. No. (*Id.* at 56:21-57:6.)

12 **2. Cuke does not help run the “day-to-day activities” of NPS**

13 NPS has stated that Cuke was engaged “to help run the day-to-day activities” of NPS.
 14 Docket No. 65 at p. 5. Ramde has sworn the same in a declaration. Exh. 2 at ¶ 8. Ramde has also
 15 sworn that “[i]n the business judgment of Network Protection Sciences . . . its relationship with
 16 Greg Cuke [is an] important asset[] of the company.” *Id.* at ¶ 10.

17 Cuke’s testimony shows those statements to be false. He explained that it would be
 18 impossible for him to help run the day-to-day activities of NPS given that he does not even know
 19 what NPS’s daily activities are:

20 **Q.** Is it accurate to say that you help run the ‘day-to-day’ business of NPS?

21 **A.** I don’t know what the day-to-day business of NPS is, so I don’t know that it’s
 fair to say that.

22 **Q.** You don’t believe that’s an accurate statement?

23 **A.** No, I don’t.

24 **Q.** Have you ever helped run the day-to-day business of NPS?

25 **A.** Again, I don’t know what the day-to-day business of NPS is. I don’t know what
 26 they do on a day-to-day basis.

27 **Q.** So that would be a no?

28 **A.** That would be a no. (Exh. 26 at 38:24-39:12.)

1 Cuke is not an NPS employee, nor does he help “run the day-to-day” activities of NPS, nor
2 is he an “important asset” to NPS. Cuke is a real estate broker. On his own and through a
3 business that he owns with his wife, Cuke owns, sells, rents and manages commercial properties in
4 east Texas. Exh. 27 (Cuke’s “LinkedIn” profile, listing real estate businesses and nothing about
5 NPS); Exh. 28 (Cuke’s Twitter account, showing recent “tweets” such as “Closed the sale of the
6 Longview Lanes Bowling Alley today” and “Leasing activity is up significantly and I finalized a
7 contract on my listed truck wash in Kilgore”). One of the office properties that Cuke owns with
8 his wife is “Suite 302” in Longview, Texas, the supposed site of NPS’s Texas “headquarters.”
9 Exh. 26 at 31:9-12 (“It’s actually owned by a company that is owned by my wife and myself,
10 yes.”).

3. NPS does not have “headquarters” in Longview, Texas

When NPS filed this case, it alleged to have an “address” at 3301 W. Marshall Ave., Suite 302, Longview, Texas (“Suite 302”). Docket No. 1 at ¶ 1. Shortly thereafter, NPS elaborated on this allegation, and represented that Suite 302 was in fact its “headquarters.” Docket No. 65 at p. 8 (“headquarters in Longview, TX”). NPS has even argued that its “headquarters” in Longview establishes that NPS is a “legitimate company” in east Texas and “its presence [in Longview] should be counted as a local interest” for the Eastern District of Texas. *Id.* at p. 15.

18 Cuke's testimony shows that these representations by NPS are just plain lies. Suite 302 is
19 no "headquarters." Suite 302 is a small room that measures about 10 feet wide. Exh. 29
20 (containing a floor-plan for Suite 302). It is a file-cabinet room and—befitting a file-cabinet
21 room—it does not even have a window. *Id.*; *see also* Exh. 26. at 66:18-24. Inside this windowless
22 file-cabinet room—NPS's supposed "headquarters"—there is not even a phone. Exh. 26 at 62:3-7
23 ("Q. There's no telephone inside Suite 302? A. There's not a telephone inside Suite 302."). The
24 room contains a computer, although Cuke has never seen it turned on or used by anyone. *Id.* at
25 62:18-23 ("Q. Have you ever seen anybody ever use that computer inside Suite 302? A. I have
26 not. Q. So far as you know, that computer's never even been turned on. Is that accurate? A. I've
27 never seen it turned on."). There is no fax machine. *Id.* at 62:8-9. There is no printer. *Id.* at 64:7-

1 8. NPS's supposed "headquarters" does not even contain a **single chair**. *Id.* at 64:3-6 ("Q. Are
2 there chairs inside Suite 302? A. There's—no, there's not. Q. No chairs? A. No chairs.").

3 Even more astounding: The windowless file-cabinet room in Longview, Texas, that NPS
4 rents from Cuke and his wife, and that NPS has falsely claimed as its "headquarters" in this
5 litigation is also claimed as the physical address for at least five other companies owned by Ramde
6 and Lam. *Id.* at 66:25-69:1. According to public documents, three of those "Suite 302"
7 companies are asserting (or have asserted) patents in over a dozen lawsuits against 35 or more
8 defendants. Not surprisingly, most of those cases have been filed in east Texas. Exh. 4; Neukom
9 Decl. at ¶ 6. Suite 302 is a litigation charade.

10 **4. Cuke has no authority to do anything for NPS, let alone to enter into
11 agreements for NPS**

12 Given that Cuke is NPS's landlord for a windowless room in east Texas, and given that he
13 is not an employee of NPS, it makes sense that he is not authorized to conduct any business for the
14 company. He is not authorized to sign checks for NPS. Exh. 26 at 28:4-7 ("Q. Are you
15 authorized to sign checks . . . on behalf of NPS? A. No, sir."). He is not authorized to convey any
16 assets for NPS. *Id.* at 28:23-24 ("I don't have the authority to dispose of their assets, no."). And
17 he testified that he has no authority to execute a contract for NPS unless specifically instructed to
18 do so by Ramde, Lam or their assistant:

19 **Q. Is it true that you do not have any authority to enter into a contract on behalf of
20 NPS unless you are specifically instructed to enter into that agreement by some
other agent or representative of NPS?**

21 **A. That's probably a fair—yes.**

22 **Q. When you say that's probably fair, your testimony is yes?**

23 **A. Yes. (*Id.* at 29:11-18.)**

24 Even more troubling, Cuke was asked whether he was authorized to do **anything** on behalf
25 of NPS without a specific, prior instruction from Ramde, Lam or their assistant. He could not
26 think of a thing:

27 **Q. Can you think of any—any conduct that you are authorized to take on behalf of
28 NPS without getting prior approval from some other NPS representative?**

1 **A.** No, I can't. (*Id.* at 34:7-10.)

2 **5. Cuke testified that he signed the Alleged Assignment 22 days after this**
case was filed

3 Fortinet put the Alleged Assignment before Cuke. He confirmed that it bears his signature
4 in the space for NPS, and is dated in his hand-writing for July 28, 2010. Exh. 13; Exh. 26 at
5 86:13-17 (“**Q.** Whose signature is that? **A.** That would be mine. **Q.** On what date did you sign this
6 document, [the Alleged Assignment]? **A.** It looks like 7/28/10.”).

7 **6. Cuke does not remember who authorized him to sign the Alleged**
Assignment; does not know its terms nor understand its terminology;
and had no idea it contained a misrepresentation when he signed it

8 Although Cuke confirmed that the Alleged Assignment bears his signature and that it is
9 dated 22 days after this lawsuit was filed, that was about the full extent of what he did know. He
10 did not remember whether he read the document before signing it. Exh. 26 at 87:2-4 (“**Q.** Do you
11 remember whether you read [the Alleged Assignment] before you signed it on July 28, 2010? **A.** I
12 don't recall specifically, no, sir.”).

13 Cuke did not remember who told him to sign the Alleged Assignment, an especially
14 damaging admission for NPS given that Cuke also testified he lacked any authority to execute a
15 contract for NPS on his own:

16 **Q.** Who told you to sign this patent assignment?

17 **A.** I don't recall specifically. (*Id.* at 87:5-6.)

18 Cuke was unable to identify any “consideration” at all that was provided by NPS in
19 exchange for becoming the supposed assignee of the ‘601 patent, even though the Alleged
20 Assignment requires an exchange of consideration in its opening sentence:

21 **Q.** Do you know how much money NPS paid to become the assignee of the ‘601
22 patent?

23 **A.** I do not. I have no idea.

24 **Q.** Do you have any understanding of whether NPS paid or conveyed anything of
25 value other than money to become the assignee of the ‘601 patent?

26 **A.** If I know that, it's long forgotten. I don't recall anything specific about that, no.
27 (*Id.* at 73:6-13.)

28 * * *

Q. What was the good and valuable consideration that NPS provided to Mount Hamilton in exchange for a patent assignment?

A. I'm not privy to those things, so I don't know. If it's not in [the Alleged Assignment], I don't know. . . .

Q. Are you aware—can you tell me what consideration NPS provided to Mount Hamilton in exchange for in patent assignment?

A. No, I told you I'm not aware what it was. (*Id.* at 87:10-89:8.)

7 Cuke as NPS's signatory was asked whether he understood certain terms in the Alleged
8 Assignment, and admitted he did not. *Id.* at 89:17-18 (no understanding of a "utility model");
9 89:19-25 (no understanding of the "Paris Convention"); 90:1-3 (no understanding of the
10 "International Patent Cooperation Treat"); 94:4-12 (no understanding of "choice of law
11 principles").

12 At his deposition, Cuke was also directed to the following language contained in the
13 Alleged Assignment: "There are no actions, suits, investigations, claims or proceedings
14 threatened, pending or in progress relating in any way to the patent rights." Exh. 13 at ¶ 2. That
15 representation was untrue when Cuke signed the Alleged Assignment on July 28, 2010, because
16 this case was filed 22 days earlier. But Cuke did not know that:

Q. Was that accurate as of July 28, 2010, when you signed this patent assignment?

A. I have no earthly idea.

Q. If I told you that this lawsuit was filed on July 10 [sic], 2010, does that sound right to you?

A. I don't know when it was filed, so if you say so, I have no reason not to believe you. (Exh. 26 at 92:1-8.)

22 Cuke did not know that he was signing a legal instrument that contained a false statement
23 because NPS never even told him that it had already filed suit on the '601 patent before Cuke
24 signed it:

Q. Okay. Were you aware when you were told to sign this document on July 28, 2010, that as of the date you were signing it, it contained at least one misrepresentation?

A. No, sir.

1 **Q.** Nobody told you that?

2 **A.** No, sir.

3 **Q.** By the time you signed this assignment . . . had anybody from NPS told you
4 that 18 [sic] days earlier they had filed a lawsuit on the '601 patent?

5 **A.** I—I have no way of knowing that. I don't really know.

6 **Q.** You don't remember anybody from NPS telling you when they asked you to
7 sign this on July 28th that they had already filed a lawsuit 18 [sic] days earlier?

8 **A.** No, I'm sure they wouldn't have called me that to tell me that. . . .

9 **Q.** So your testimony is you don't remember them telling you that they filed suit
10 prior to July 28th?

11 **A.** I don't believe that they would have.

12 **Q.** And you have no memory of them telling you that before July 28th?

13 **A.** No, sir. (*Id.* at 92:9-93:8.)

14 **III. ARGUMENT**

15 **A. This Case Should Be Dismissed Because NPS Did Not Own the '601 Patent on 16 July 6, 2010**

17 The case law is clear that a patent case must be dismissed if the plaintiff cannot meet its
18 burden to show that it owned the asserted patent, according to a complete and executed written
19 instrument that satisfies 35 U.S.C. § 261, as of the date on which the case was filed. *See Abraxis
20 Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1366 (Fed. Cir. 2010) (dismissing case for lack of
21 standing in absence of written assignment to plaintiff, despite corporate affiliate's prior ownership
22 of patent). In dismissing a patent case on these grounds in 2008, this Court explained the
23 importance of the doctrine:

24 In light of the proliferation of patent-infringement actions, it is not too much to ask
25 sophisticated patent litigants to be careful when it comes to the threshold issue of
26 standing. It is a simple task to execute express license agreements that satisfy the
27 Federal Circuit standard. Among affiliated companies, it should be even simpler. It
28 is true that patent litigants sometimes rush to stake out venue in a preferred forum.
29 **A rush to sue, however, cannot excuse the stern necessity of perfecting the
30 required title before suit.** District judges cannot overlook a defect in the chain of
31 title, for the entirety of massive litigation might wind up being vacated years later,
32 for lack of threshold standing. *See Gaia Techs., Inc., v. Reconversion Techs., Inc.*,
33 93 F.3d 774 (Fed. Cir. 1996) (vacating a final judgment after a full trial on the
34 merits because of a deficiency in standing). As carpenters say, it is wise to
35 "measure twice and cut once."

1 *Quantum Corp. v. Riverbed Tech., Inc.*, No. C 07-04161-WHA, 2008 WL 314490, at *3 (N.D.
 2 Cal. Feb. 4, 2008) (emphasis added).

3 In this case, NPS filed suit on July 6, 2010. Docket No. 1. But NPS did not execute the
 4 Alleged Assignment until 22 days later, on July 28, 2010. Exh. 13 (indicating that NPS
 5 “accepted” the patent assignment on July 28, 2010); Exh. 26 at 86:13-17. NPS therefore did not
 6 “accept” or own the ‘601 patent by July 6, 2010, and lacks standing.

7 Fortinet anticipates that NPS will argue that the Alleged Assignment was effective on an
 8 earlier date, as of April 30, 2010, when a supposed representative of Mount Hamilton as the
 9 supposed transferor appears to have executed the document. Exh. 13 (including the signature of
 10 “Mark Figuereido” as an “authorized agent” for Mount Hamilton, dated April 30, 2010). This
 11 argument is wrong—and the Alleged Assignment had no effect until NPS “accepted” it on July
 12 28, 2010, if ever—for two reasons.

13 **First**, the Alleged Assignment could be effective with a signature from Mount Hamilton,
 14 and no signature from NPS, only if the document commemorates a gift or a unilateral conveyance
 15 from Mount Hamilton. But the text of the Alleged Assignment disproves that argument a few
 16 times over. For example, the Alleged Assignment states explicitly that it is not a gift but rather an
 17 agreement to “sell” the ‘601 patent in exchange “[f]or good and valuable consideration.” Ex. 13
 18 at p. 1. A sale is not a gift or a unilateral conveyance; it is a mutual exchange of consideration that
 19 cannot be completed without mutual assent. *Summers v. Mills*, 21 Tex. 77, 87 (1858) (explaining
 20 that a contract for sale requires offer and acceptance)⁴; *see also* Restatement (Second) of Contracts
 21 § 332(5)(a) (providing that “[a]n assignment is [not] gratuitous [if] given or taken (a) in exchange
 22 for a performance . . . that would be consideration”).

23 Because the Alleged Assignment is an agreement for a sale, the assignment was no gift,
 24 and the assignment requires delivery by Mount Hamilton and a signature for acceptance by NPS.

25
 26 ⁴ Fortinet cites to Texas contract law, in discussing the Alleged Assignment, because the
 27 document states it should be construed according to the laws of Texas. Exh. 13 at p. 3
 28 (NPS0050201).

1 *Stanwood Boom Works, LLC v. BP Exploration & Production, Inc.*, No. 11-20511, 476 Fed.
 2 App'x 572, 574-75 (5th Cir. 2012) (explaining that signature and delivery are typically required to
 3 prove assent to an agreement). The only evidence available to this Court indicates that NPS
 4 accepted (if at all) 22 days after suit was filed.

5 For further example, the Alleged Assignment **requires** a dated signature from, and
 6 acceptance by, NPS right on the face of the document. Exh. 13 at p. 4. This is not a case in which
 7 the disputed document called for a signature from Mount Hamilton, only, and then NPS just
 8 happened to scribble a signature somewhere on the page at a later and irrelevant date. In this case,
 9 the disputed document was prepared to include a type-faced signature block that reads
 10 “ACCEPTED BY,” includes the name “Network Protection Sciences, LLC” and furthermore
 11 requires a date to be filled in by NPS. *Id.* Either the Alleged Assignment required a dated
 12 signature by NPS to be complete—which did not happen until after this suit was filed—or Ramde
 13 and Lam prepared a document with a meaningless signature block.

14 But NPS cannot ask this Court to consider the Alleged Assignment complete as of Mount
 15 Hamilton’s signature on April 30, 2010, by ignoring the express contents of the Alleged
 16 Assignment that indicate it was not complete on that date. All terms in the Alleged Assignment
 17 must be given effect, and no terms—including the type-faced signature block for NPS—can be
 18 considered superfluous. *Harris Methodist Fort Worth v. Sales Support Servs. Inc. Employee*
 19 *Health Care Plan*, 426 F.3d 330, 334 (5th Cir. 2005) (applying Texas law and determining
 20 whether an assignment occurred by “examin[ing] and consider[ing] the entire writing and giv[ing]
 21 effect to all provisions such that none are rendered meaningless”) (citation omitted); *Alpert v.*
 22 *Riley*, 274 S.W.3d 277, 288 (Tex. App. 2008) (explaining that courts should construe a contract so
 23 as not to render terms superfluous). The Alleged Assignment’s terms—the reference to NPS
 24 paying “good and valuable consideration” for the patent, the use of the term “sale,” and the
 25 inclusion of a signature block for NPS—all indicate that it required acceptance by NPS before
 26 becoming valid. This Court should not let NPS argue otherwise.

27 **Second**, NPS cannot argue that the post-suit execution of the document by NPS was
 28 unnecessary to complete the patent transfer because this Court has already heard an argument

1 similar to this, and rejected it. In *Quantum*, the plaintiff presented one patent assignment
 2 document dated pre-suit, and another document dated post-suit. The plaintiff argued that the pre-
 3 suit document was sufficient to pass title, and that the post-suit document was executed just “to
 4 avoid any questions.” 2008 WL 314490, at *3. Not only did this Court rightly reject that
 5 argument, the Court furthermore found that the existence of the post-suit document “suggests that
 6 plaintiff realized that the [earlier] agreement needed fixing.” *Id.* The same holds true here: even
 7 supposing that Cuke was authorized to sign the Alleged Assignment on July 28, 2010, if he was,
 8 that indicates that Ramde and Lam were aware that no transfer was completed until that signature
 9 occurred. Otherwise, there would have been no reason for Cuke to sign the document.

10 **B. This Case Should Be Dismissed Because NPS Has Never Owned the ‘601
 11 Patent**

12 Standing defects at the time of filing cannot be cured by *nunc pro tunc* assignments. *Gaia
 13 Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 779 amended on reh’g in part, 104 F.3d
 14 1296 (Fed. Cir. 1996) (holding that a *nunc pro tunc* assignment was “not sufficient to confer
 15 standing . . . retroactively”). Even if such assignments were effective, though, NPS cannot show
 16 that it owns the patent today. NPS can make no such showing because the Alleged Assignment
 17 appears invalid for a few reasons.

18 **First**, the Alleged Assignment fails because NPS cannot prove that it was signed by an
 19 authorized signatory for **either** Mount Hamilton or NPS. It is NPS’s burden to prove that it has
 20 standing. *Abbott Point of Care Inc. v. Epocal, Inc.*, 666 F.3d 1299, 1302 (Fed. Cir. 2012)
 21 (“Abbott [the plaintiff] has the burden to show necessary ownership rights to support standing to
 22 sue.”). And in order to prove that the purported assignment of the ‘601 patent was valid under the
 23 document’s governing law, NPS must prove that its signatories were authorized agents of the
 24 contracting parties. *R & R Marine, Inc. v. Max Access, Inc.*, 377 S.W.3d 780, 787 (Tex. App.
 25 2012). But NPS has made no such showing for either signatory to the agreement.

26 For Mount Hamilton, the signatory is listed as “Mark Figuereido.” His title is listed simply
 27 as “Authorized Agent.” But Figuereido is a stranger to this litigation. NPS did not identify him in
 28 initial disclosures. Exh. 1. There is no evidence in this case that he is a principal, or even an

1 employee, of Mount Hamilton. And NPS has failed on numerous occasions to explain in
 2 interrogatory answers who he is, or even whether he was authorized to transfer the '601 patent on
 3 behalf of Mount Hamilton. Exhs. 14 & 21 (NPS's interrogatory answers on patent transfers, silent
 4 as to "Mark Figuereido").

5 For NPS, Cuke signed the Alleged Assignment. But Cuke is a real estate broker in east
 6 Texas who NPS has falsely described in this litigation as an NPS "employee." Last week, Cuke
 7 testified that he has never been an employee of NPS. Exh. 26 at 11:3-5 ("I've never been an
 8 employee of NPS."). He lacks any authority to sign any contract for NPS unless specifically
 9 instructed to do so. *Id.* at 29:11-18. He signed the Alleged Assignment using a fake title that was
 10 apparently invented for litigation. *Id.* at 56:21-57. And he cannot remember who instructed him
 11 to sign the Alleged Assignment. *Id.* at 87:5-6.

12 NPS has had multiple opportunities to explain how the '601 patent was transferred from
 13 Mount Hamilton to NPS, including the circumstances of the execution of the supposed transfer
 14 document, and has failed to do so. Exhs. 14 & 21. NPS cannot show (now) that it was signed
 15 with authorization on either side. The Assignment was therefore never executed by either side,
 16 and NPS lacks standing.

17 **Second**, the Alleged Assignment fails for a lack of consideration. Texas law requires that
 18 any valid contract must entail mutual consideration. *Omni USA, Inc. v. Parker-Hannifin Corp.*,
 19 798 F. Supp. 2d 831, 846 (S.D. Tex. 2011) ("To prove the existence of an enforceable contract, a
 20 party must demonstrate . . . consideration or mutuality of obligations."). The Alleged Assignment
 21 recognizes this—and confirms that it is not simply a unilateral assignment—by stating that NPS
 22 has provided "good and valuable consideration" for the '601 patent. Exh. 13 at p. 1.

23 But the Assignment does not state what "consideration" NPS in fact provided to Mount
 24 Hamilton in exchange for the patent. Cuke, as NPS's signatory for the Alleged Assignment,
 25 testified numerous times that he has no idea what if any consideration was provided by NPS to
 26 Mount Hamilton for the '601 patent. Exh. 26 at 73:6-13; 87:10-89:8. For its part, NPS has failed
 27 to identify any consideration at all in interrogatory answers that NPS served and verified in 2011,
 28 and in separate interrogatory answers that NPS served and verified in 2013. Exhs. 14 & 21. NPS

1 has even been asked to supplement those interrogatory answers, and yet has failed to do so. Exhs.
 2 23 & 24. Given the record before the Court, it appears that NPS actually gave no consideration to
 3 Mount Hamilton in exchange for the '601 patent, despite Texas law requiring such consideration,
 4 and despite the Alleged Assignment recognizing that requirement. The Alleged Assignment is
 5 therefore invalid; NPS does not own the patent even today and dismissal is required.

6 **C. This Case Should Be Dismissed for Litigation Misconduct**

7 **1. This Court has the power to dismiss for litigation misconduct**

8 This Court has the power to dismiss a case, for prejudice, based on litigation misconduct
 9 by a party. Normally when deciding whether to dismiss a case for litigation misconduct, courts
 10 consider a five-factor test.⁵ Numerous courts, however, have found that filing false or misleading
 11 statements with the court, and providing untrue or incomplete information in discovery, satisfies
 12 that test and justifies dismissal:

13 It is well settled that dismissal is warranted where, as here, a party has engaged deliberately in
 14 deceptive practices that undermine the integrity of judicial proceedings: courts have inherent
 15 power to dismiss an action when a party has willfully deceived the court and engaged in
 16 conduct utterly inconsistent with the orderly administration of justice.

17 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995); *see also*
 18 *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369 (Fed. Cir. 2001) (affirming this Court's
 19 dismissal and award of fees where plaintiff submitted falsified documents into evidence);
 20 *Englebrick v. Worthington Indus., Inc.*, No. 8:08-cv-01296-CJC, 2013 WL 2007025, at *8 (C.D.
 21 Cal. May 13, 2013) (collecting cases); *id.* ("Providing false or incomplete information during a
 22 deposition or in response to a discovery request constitutes the sort of willfulness, bad faith, or
 23 fault required for dismissal.").

24
 25
 26 ⁵ *Anheuser-Busch*, 69 F.3d at 348 ("(1) the public's interest in expeditious resolution of
 27 litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking
 28 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the
 availability of less drastic sanctions.").

2. NPS has engaged in multi-year misconduct

2 NPS has engaged in ongoing misconduct, including false statements to the Court. The
3 misconduct began with the bogus “Texas story”—that NPS has “headquarters” and an “employee”
4 in Texas, which fake employee supposedly executed the Alleged Assignment, more than three
5 weeks after this case was filed. The misconduct then continued as NPS has sought to mislead and
6 delay Fortinet’s fact discovery into the standing issues at the heart of this motion; and to assert
7 50+ patent claims against 70+ Fortinet products for almost three years, imposing an unreasonable
8 burden on Fortinet. This “pattern of deception and discovery abuse,” described in greater detail
9 below, justifies dismissal. *Anheuser-Busch*, 69 F.3d at 349.

(a) NPS Has Filed False Complaint Allegations and Motion Papers

11 After NPS filed this lawsuit in Texas, it represented that it “is a Longview, Texas based
12 business.” Docket No. 65 at 1. When opposing a transfer motion, NPS argued that it maintains
13 “headquarters in Longview.” *Id.* at 8. NPS even argued that its supposed headquarters in Texas
14 constitute a “presence [that] should be counted as a local interest.” *Id.* at p. 15. Filing those false
15 statements in litigation constitutes misconduct. NPS is owned and run by attorneys Ramde and
16 Lam, here in Mountain View, California, and NPS’s only presence in Longview, Texas, is a small
17 file-cabinet room with no window, telephone, printer or even a chair; with a computer that has
18 never been turned on, according to the landlord; and is also claimed as headquarters for five other
19 legal entities which collectively have asserted patent claims in over a dozen different lawsuits
20 against 35 different defendants. *See* II(J)(3), above.

21 Also while seeking to keep this case in Texas, NPS argued that it had “a Texas employee”
22 who was hired “to help run the day-to-day activities” of the company. Docket No. 65 at pp. 1, 5.
23 But the “employee” testified four different times that he is not an employee, and that he performs
24 hourly services for NPS so infrequently that he cannot remember the last time he even submitted
25 an invoice to be paid. *See* II(J)(1), above. Likewise, he denied that he “help[s] run the day-to-day
26 activities” of NPS, explaining that he does not even know what NPS does on a day-to-day basis.
27 Exh. 26 at 38:24-39:12.

(b) NPS and Ramde Filed an Untrue Declaration

2 Ramde was even more detailed in his false statements about the “Texas story.” He
3 declared that NPS has “offices in Texas”; that he “set up [the] offices in Longview”; that he
4 personally “engaged Greg Cuke to help run the day-to-day activities” of NPS; and that Cuke has
5 in fact been helping to run the day-to-day operations since March 2010. Exh. 2 at ¶¶ 1 & 8.
6 Seemingly desperate to keep this case in Texas, Ramde even declared that: “In the business
7 judgment of Network Protection Sciences . . . its relationship[] with Greg Cuke . . . [is an]
8 important asset[] of the company.” *Id.* at ¶ 10. These are the false, sworn statements of NPS’s
9 President and principal shareholder in describing (i) a small file-cabinet room without windows or
10 a phone, and (ii) a Texas real estate broker who refuses to be called an NPS “employee.”

(c) The Fake Title: “Director of Business Development”

12 Throughout this litigation, NPS has insisted that Cuke is the company’s “Director of
13 Business Development.” Exh. 1 at p. 2. Fittingly, NPS has also produced a supposed patent
14 assignment signed by Cuke—the document at the heart of this motion—in which he wrote his title
15 as “Director of Business Development.” Exh. 13 at p. 4. But Cuke has now admitted under oath
16 that this title was fabricated for litigation. He could not think of a single document, ever, listing
17 him with that title except for documents created specifically for this lawsuit. Exh. 26 at 56:21-
18 57:6.

(d) NPS Served Incomplete, Misleading Interrogatory Answers on Standing Issues

20 NPS has been asked in two interrogatories to explain the transfers of the ‘601 patent,
21 including whether and if so how NPS became the patent’s owner. In both instances, NPS
22 provided a cryptic response, stating only that Mount Hamilton “signed” an assignment. Exh. 14 at
23 p. 5; Exh. 21 at p. 7. NPS refused to disclose any negotiations, “terms,” “circumstances” of or
24 individuals who executed the transfer. *Id.* NPS has failed to provide any update to those
25 interrogatory answers, despite promising to “investigate” the issue and to supplement as
26 necessary. Exhs. 23 & 24. NPS’s refusal to provide any substantive information in interrogatory

1 answers about how it acquired the '601 patent is especially troublesome given the standing
2 problems that Fortinet has since discovered.

(e) NPS Strategically Delayed Fact Discovery on Standing Issues

Especially in hindsight, it is clear that NPS has been intentionally dragging its feet on fact discovery relevant to standing issues. The Alleged Assignment was signed by Cuke on July 28, 2010—22 days after this lawsuit was filed. Exh. 13. But NPS did not produce the document to Fortinet until August 31, 2012—more than **two years later**. Exh. 30 at p. 8 (indicating the Bates range including the Alleged Assignment); *id.* at p. 9 (indicating that the document was being produced that evening, August 31, 2012).

10 Fortinet served a subpoena for Gregory Cuke—whose listed title in NPS’s initial
11 disclosures matched the title written next to an illegible signature on the Alleged Assignment—in
12 January 2013. Exh. 15. Counsel for NPS delayed accepting service of the subpoena, even though
13 NPS had listed Cuke in its initial disclosures with “counsel for NPS” as his point of contact. Exh.
14 16. NPS next served objections to the Cuke subpoena, complaining that Fortinet’s requested time
15 and location was “burdensome,” and yet offering no alternative. Exh. 18.

16 Thereafter, for months, NPS counsel refused to provide a date for Cuke's deposition
17 despite repeated requests from Fortinet. Exhs. 15-20. Even after NPS agreed to present Cuke for
18 deposition, in June 2013, NPS invited Fortinet to cancel deposition eight days before it was
19 scheduled by promising not to use any Cuke testimony. Exh. 25.

(f) For Almost Three Years of Litigation, NPS Has Put Unreasonable Burdens on Fortinet Through Unwieldy and Insufficient Infringement Contentions

22 This Court has already found that NPS—by asserting 40+ and then 50+ patent claims
23 against Fortinet for most of the litigation—has “behaved unreasonably in imposing unnecessary
24 cost on its opponent.” Docket No. 197 at p. 3. NPS has multiplied that burden by asserting the
25 ‘601 patent claims against **over 70 Fortinet products**.

26 NPS has not provided a claim chart for the 70+ Fortinet products that NPS insists are part
27 of this case, which is required under Patent L.R. 3-1(b). Instead, NPS has provided a claim chart
28 for FortiOS, an operating system for which Fortinet customers are not charged, and on which

1 Fortinet customers may operate certain Fortinet applications. Exh. 30 at 3 and Exhibit A (NPS
 2 updated infringement contentions and chart). Even for FortiOS, NPS has not provided a complete
 3 claim chart, but rather has disclosed a theory under which “imd and http” proxies in the FortiOS
 4 product infringe the ‘601 patent. *Id.*

5 Based on this incomplete claim-charting for two specific proxy functions in FortiOS, NPS
 6 has then contended in conclusory fashion that its claim chart applies to **all** proxy functions in
 7 FortiOS in addition to the imd and http proxies, “including ftp, imap, pop3, smtp, nntp, and ssl”
 8 functions. *Id.* at p. 3 and Exhibit A. NPS then contends—again without explanation—that its
 9 partial claim chart for FortiOS “applies to all products identified in Exhibit B.” *Id.* at p. 3. Exhibit
 10 B, in turn, lists 73 different Fortinet devices. *Id.* at Exhibit B. NPS does not identify how the
 11 proxy functions it charts for FortiOS allegedly are used by these applications. In fact, some of the
 12 devices listed on Exhibit B—such as FortiAP—do not run FortiOS or any proxies at all.

13 Fortinet brought some of these and other deficiencies to NPS’s attention in a letter dated
 14 March 18, 2013. Exh. 31 at p. 2–4 (observing that NPS provided very few pin-cites to source
 15 code; addressed no FortiOS proxies other than “imd” and “http” despite claiming that all proxies
 16 infringe; referred to “Fortinet documents” without specifying what documents; and “identif[ied]
 17 no evidence that any of the 73 ‘Accused Instrumentalities’ listed in Exhibit B infringe the ‘601
 18 patent”). At the same time, on March 18, 2013, Fortinet offered to let NPS update its infringement
 19 contentions to remedy these deficiencies. *Id.* at 1–2. NPS refused. NPS has spent almost three
 20 years asserting 40+, then 50+, then 15, and now 5 patent claims against a list of 70+ Fortinet
 21 products, without ever disclosing infringement contentions that satisfy the Patent Local Rules.

22 **IV. CONCLUSION**

23 Because NPS did not own the ‘601 patent when it filed suit, Fortinet respectfully requests
 24 that this case be dismissed for lack of standing. Because NPS has committed widespread litigation
 25 misconduct in attempting to manufacture standing, manipulate venue, obstruct discovery and
 26 deceive the parties and the Court, Fortinet respectfully requests that this case be dismissed with
 27 prejudice. And because NPS’s litigation misconduct makes this case “exceptional” under 35
 28 U.S.C. § 285, Fortinet respectfully requests that it be awarded its fees, costs and expenses.

1 DATED: June 13, 2013

Respectfully submitted,

2 */s/ John M. Neukom*

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